IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-926

GERALDINE G. CANNON,

Petitioner,

vs.

THE UNIVERSITY OF CHICAGO, ET AL.,

Respondents.

GERALDINE G. CANNON,

Petitioner,

vs.

NORTHWESTERN UNIVERSITY, ET. AL.,

Respondents.

JOINT BRIEF OF RESPONDENTS THE UNIVERSITY OF CHICAGO AND NORTHWESTERN UNIVERSITY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Regulations.

Other.

QUESTION PRESENTED.

Title IX of the Education Amendments of 1972 (86 Stat. 373-75; 20 U. S. C. § 1681, *et seq.*) declares that no person shall be subject to discrimination on the basis of sex in any federally assisted education program. Effectuation and enforcement of Title IX is delegated to the Department of Health, Education and Welfare; agency action is subject to judicial review. No private right of action is provided. Was the court below correct in concluding that no private right of action could be inferred and that federal administrative enforcement followed by judicial review is the exclusive remedy?

STATUTE INVOLVED.

The Petition does not include those sections of Title IX relating to federal administrative enforcement and judicial review. The relevant sections are set forth in an appendix to this brief. These are 20 U. S. C. §§ 1681-83 (Sections 901-3, Title IX of the Education Amendments of 1972, Public Law 92-318, 86 Stat. 373-75).

STATEMENT OF THE CASE.

Petitioner applied for admission to the 1975 entering class of the six medical schools in Illinois. After her application was rejected by all, she filed administrative complaints with HEW alleging sex discrimination in the denial of her applications.

Shortly thereafter, she brought the instant suit against respondents, The University of Chicago and Northwestern University, alleging a violation of Title IX. Petitioner's allegations were premised solely upon an inference drawn from an allegation of age discrimination. The gist of her complaint was that the medical schools discouraged application by persons over 30—as was petitioner—and that this had an adverse impact on females.

The requested relief included, *inter alia,* an injunction requiring her admission. An amended complaint added as parties the Secretary of HEW and the Regional Director of the Office of Civil Rights of HEW.

Petitioner also alleged violations of her 14th amendment rights under the Civil Rights Act of 1871, 42 U. S. C. § 1983; § 799A of the Public Health Services Act, 42 U. S. C. § 295h-9, and the Age Discrimination in Employment Act, 29 U. S. C. § 621 *et seq.*

The Court of Appeals affirmed the district court's ruling that petitioner had failed to state a claim under any of these statutes. Cert. Pet. A. 2-21. Rehearing was then granted on the sole question of "whether, in the circumstances of this case, a private cause of action lies under Title IX of Public Law 92-318."[1]

Upon reexamination of the reasons for its granting the petition for rehearing—the impact of the then recently enacted Civil Rights Attorney's Fees Award Act of 1976 and its earlier reading of *Lau* v. *Nichols,* 414 U. S. 563 (1974)—the Court of Appeals reaffirmed its initial decision. Cert. Pet. A. 22-34.

A petition for rehearing *en banc* on all jurisdictional grounds asserted in the complaint was subsequently denied. The petition for certiorari presents only the Title IX issue.

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1. To this point in the litigation, the federal respondents—the Secretary of HEW and the Regional Director of the Office of Civil Rights of HEW—had vigorously supported the position of the University respondents that there was no private right of action under Title IX, and had filed a memorandum opposing the petition for rehearing. The federal respondents then, without explanation, reversed their position, withdrew their memorandum opposing rehearing and thenceforth just as vigorously supported the position of petitioner. As the Court of Appeals noted, HEW never explained why it no longer believed, as it once had told the court, that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Cert. Pet. A. 28.

ARGUMENT.

1. Introduction.

Petitioner was one of 5427 who applied for the 104 positions available in the 1975 entering class at The University of Chicago Pritzker School of Medicine. Cert. Pet. A. 3. Although petitioner states she had higher academic qualifications than a substantial number of the accepted applicants (Cert. Pet. 4, 13), this claim is unsupported by the record and, in fact, is directly contradicted. The record discloses that her Medical College Admission Test Score in mathematical skills placed her in the lowest 20% of the applicant group; her science score placed her in the lower half of the applicant group. The Dean of Students stated in an affidavit of record that there were at least 2,000 unsuccessful applicants with better academic qualifications than petitioner. Cert. Pet. A. 3.

Petitioner alleged that the admission policies had an adverse impact on females. The fact is that over the four years 1972-75, 18.1% of the applicants and 18.3% of the entering classes have been female.[2] Cert. Pet. A. 3.

The issue here is not whether petitioner was academically qualified. However, her relatively low academic standing among the 5427 applicants illustrates the potential burden this case represents. For if petitioner prevails on the jurisdictional issue presented here, then every disappointed applicant, male or female, of whatever race, for admission to a private educational institution of higher learning which receives federal assistance (and that includes virtually every one), could require the admissions committee of that school to justify in court its decision respecting the applicant by merely alleging race or sex discrimination. The effect of a finding that Title IX permits an individual

2. These statistics apply to The University of Chicago. The admission practices at Northwestern University are similar. Cert. Pet. A. 3, n. 2. Northwestern University had stated in a letter to petitioner, referred to in the amended complaint, that the ratio of acceptances to applicants was about 1 to 80.

private right of action is to make the trial court the admissions committee. For a claim by an applicant such as petitioner cannot be determined without considering the relative qualifications of all those against whom she has competed—including the 2000 unsuccessful applicants to the University of Chicago Pritzker School of Medicine whose qualifications were superior to hers. And if the trial court should determine that petitioner is deserving, then it must decide which of the 104 successful applicants should be displaced.

If Congress had clearly stated in Title IX that this enforcement procedure was intended, then, however onerous the burden, such a procedure would have to be followed. But such an intent ought not be lightly inferred.

Here the Court of Appeals found that "in the face of the carefully constructed scheme of administrative enforcement contained in the Act," no private right of action could be inferred. Cert. Pet. A. 14.

"Considering our already overburdened [judicial] system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accommodate." Opinion, Court of Appeals, Cert. Pet. A. 17.

The language and history of the statute and prior decisions of this Court clearly support the conclusion of the Court below. Neither *Lau* v. *Nichols*, 414 U. S. 563 (1974), nor the Civil Rights Attorney's Fee Award Act of 1976, 42 U. S. C. § 1988, implies a different result.

2. The Statutory Scheme.

Title IX "authorizes and directs" HEW—the agency empowered to extend federal aid to educational institutions—to "effectuate" the nondiscrimination purposes of the Title through "rules, regulations, or orders of general applicability." 20 U. S. C. § 1682.

The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort for a recalcitrant institution which has been found to discriminate in violation of the Act. 20 U. S. C. § 1682. After "department or agency action taken pursuant to § 1682" there is a right to judicial review. 20 U. S. C. § 1683. Not only is no direct private action contemplated, but Congress made clear in Title IX itself that no action of any type is permissible until "the department or agency concerned has advised the appropriate person or persons of the failure to comply with the [substantive] requirements [of Title IX] and has determined that compliance cannot be secured by voluntary means." 20 U. S. C. § 1682.[3]

The legislative history of Title IX supports a plain reading of the Title. It was intended to "require hearings and notice, and the normal administrative procedures are set out."[4]

3. The procedure to be followed is further detailed in regulations issued by HEW. (45 C. F. R. § 86.71.) Pursuant to these regulations, any person alleging discrimination may file a complaint with HEW. HEW in turn is required to inform the institution involved, investigate the complaint, and attempt to resolve the matter informally if it finds discrimination. (45 C. F. R. § 80.7.) The regulations emphasize the importance of attempting voluntary compliance with the nondiscrimination requirements of the statute in requiring that HEW seek cooperation from recipients and provide assistance and guidance in order to achieve voluntary compliance. (45 C. F. R. § 80.6.)

If discrimination is found, and if voluntary compliance is not forthcoming, the regulations provide for a hearing to determine whether or not federal assistance should be terminated (45 C. F. R. §§ 80.8-80.11). Intra-agency and judicial review procedures are provided once termination is found appropriate. *Id.* And finally, the regulations afford a procedure through which federal assistance which has been terminated may be reinstated. (45 C. F. R. § 80.10(g).)

4. 117 Cong. Rec. 30407 (1971). See Opinion of Court of Appeals, Cert. Pet. A. 15; A. 29-31.

Title IX was itself modeled after Title VI of the Civil Rights Act of 1964, 42 U. S. C. Sec. 2000d *et. seq.* The legislative history of Title VI is fully discussed in the Supplemental Brief for Petitioner, *The Regents of the University of California* v. *Bakke*, No. 76-811, at pages 13-27.

3. Prior Decisions of This Court.

Contrary to petitioner's strained reading of *Cort* v. *Ash*, 422 U. S. 66 (1974), to the effect that "no purpose to deny a cause of action is evident in either Title VI or Title IX" (Cert. Pet. 11), the Court's decisions point the other way. The provision of a specific means of enforcement in Title IX implies that no other remedy was intended. *National Railroad Passenger Corp.* [*Amtrak*] v. *National Association of Railroad Passengers*, 414 U. S. 453, 458 (1974):

> A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929).

To the same effect is *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975); and, despite petitioner's interpretation, *Cort* v. *Ash*, 422 U. S. 66, 82-84 (1975), where the Court denied a private right of action, in part, on the absence of any evidence that Congress intended a private right of action.

A closely analogous case is *Brown* v. *General Services Administration*, 425 U. S. 820 (1976), holding that § 717 of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-16 (which, like Title IX, provides for administrative and judicial remedies) was the exclusive remedy for claims of discrimination in federal employment. This Court's explanation for its decision is strikingly applicable here (425 U. S. at 832-33):

> The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, § 717 does not

> contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers. . . . It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.

The doctrine of primary jurisdiction also dictates that the judiciary stay its hand until the administrative agency, charged by Congress with effectuation and enforcement of the statutory prohibition, has acted.

HEW has stated that the issues raised in petitioner's administrative complaint against Illinois medical schools are "national in scope," and that "national Office for Civil Rights [of HEW] policy must be developed." Cert. Pet. A. 35. Within a few months of filing her administrative complaints, petitioner initiated this suit, asking that respondents be enjoined from engaging in the allegedly improper conduct which is the subject of her administrative complaints and that the respondent schools be required to admit her.[5]

This Court has underscored the applicability of the primary jurisdiction doctrine in similar circumstances involving the development of national transportation policy by the ICC. In *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U. S. 800, 821 (1973), the Court said:

> Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a

5. Petitioner complains of HEW's delay in acting on her administrative complaint. Cert. Pet. 14. One possible explanation is that, with its dramatic change of position after the filing of the petition for rehearing in the Court of Appeals, HEW is delaying development of "national policy" pending final disposition of this action. In any event, the remedy for HEW's procrastination is not the implication of a private right of action against the respondent medical schools, but an order directing HEW to proceed with its Congressional mandate. In fact, the amended complaint in this case asks for just such a remedy against HEW as an alternative to an injunction against the University respondents.

> court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. Depending on the type of error the reviewing court finds in the administrative proceedings, *the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid.* The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action. [Citations omitted.] (Emphasis added.)[6]

4. Lau v. Nichols.

Petitioner has relied throughout this litigation on *Lau* v. *Nichols*, 414 U. S. 563 (1974), a class action to compel bilingual instruction against the San Francisco school district on behalf of the 1800 Chinese-speaking students in the district. Petitioner quotes from the Court's decision to the effect that it did not rely on the Equal Protection Clause but solely on Title VI in reversing the lower court. Cert. Pet. 10. From this petitioner assumes that the Court based *jurisdiction* on Title VI, the prototype of Title IX. But jurisdiction in fact was based on 42 U. S. C. § 1983, the defendant being a state agency.[7] Jurisdiction under § 1983 is invoked through a claim of "deprivation of rights . . . secured by the Constitution and *laws*." The Court's comment was simply an indication that it relied on the law, not the Constitution, to find the deprivation of rights. It did not say that it found jurisdiction under Title VI rather than § 1983, as petitioner assumes. The interplay between § 1983 and federal

6. See Cert. Pet. A. 16 n. 17.

7. The complaint here alleged that the University respondents, although private institutions, were within the purview of 42 U. S. C. § 1983. The Court of Appeals found otherwise. Cert. Pet. A. 4-11. This finding is not challenged in the Petition.

law is discussed in the Court of Appeals opinion. Cert. Pet. A. 31 n. 6. The parties in *Lau* never briefed or argued, nor did the Court consider, whether Title VI *alone*, apart from state action under § 1983, would support a private right of action.[8]

5. The Civil Rights Attorney's Fees Award Act of 1976.

Petitioner argues that the Civil Rights Attorney's Fees Award Act of 1976, 42 U. S. C. A. § 1988, adopted during the pendency of this litigation, is Congressional recognition of an intent to create a private right of action under Title IX since Title IX is mentioned in the Act. Cert. Pet. 8-9.

The Court of Appeals gave the complete answer to this argument. Cert. Pet. A. 25-27. Final debate on the bill took place after publication of the initial Court of Appeals decision in this case. This very case—by name—was referred to during the closing debate by Representative Railsback, one of the sponsors. He did not state the case was inconsistent with Congressional intent. To the contrary, he observed that it had to come to his attention that by adopting the Attorney Fee's bill "Congress might implicitly authorize a private right of action under Title VI and Title IX." He then stated unequivocally: "This is not the intent of Congress. . . . The bill does not authorize or statutorily grant any private right of action which does not now exist." 122 Cong. Rec. H12161 (daily ed. Oct. 1, 1976.)

8. There are other distinctions between *Lau* and the instant case. *Lau* concerned a large number of students—1800 Chinese-speaking students in San Francisco. One of the concurring opinions noted that if in another case the concern was with one or a few children, "I would not regard today's decision . . . as conclusive. . . . For me, numbers are at the heart of this case . . ." 414 U. S. at 571-72. This point was relied on in *Serna* v. *Portales Municipal Schools*, 499 F. 2d 1147, 1154 (10th Cir. 1974), in denying a private action under Title VI. The other concurring opinion in *Lau* expressed doubt that relief could be based on Title VI and relied on the HEW guidelines which required "affirmative steps to rectify the language deficiency." 414 U. S. at 569-71.

As the Court below observed, "We doubt that legislative history could be much clearer." Cert. Pet. A. 27.[9]

6. The Bakke Case.

Petitioner comments on the request by this Court for the filing of supplemental briefs in *Regents of the University of California* v. *Bakke*, No. 76-811, discussing the application of Title VI of the Civil Rights Act of 1964. Petitioner appears to suggest that this request manifests a recognition of independent jurisdiction under Title VI—and presumably under Title IX which was patterned after Title VI.

We cannot speculate on the Court's purpose in requesting supplemental briefs. The fact remains that jurisdiction in *Bakke* is clear under 42 U. S. C. § 1983 because the University of California is a state school, not a private institution as are the respondent Universities here. In this respect, *Bakke* is identical to *Lau*.

Moreover, there is a significant distinction between the *Bakke* and *Cannon* issues. *Bakke* raises a possible conflict between affirmative action efforts and alleged reverse discrimination which may result from these efforts. Its resolution is of overriding importance not only with respect to voluntary special admissions programs, but also for the guidance of state and federal agencies responsible for the enforcement of various equal employment and other civil rights statutes and for institutions upon which the statutory obligations are imposed. This issue is appropriately determined in the first instance by the judiciary.

9. Petitioner also refers to the Rehabilitation Act of 1973, 29 U. S. C. § 794. Cert. Pet. 5, 11 n. 12. That Act contains no administrative enforcement and judicial review provisions comparable to those in Title IX. See the Court of Appeals opinion on rehearing, Cert. Pet. A. 32. The suggestion that *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977), is inconsistent with the opinion below overlooks the footnote in *Lloyd* which leaves open as "premature" the question whether after procedural enforcement regulations are issued to implement the Rehabilitation Act "the judicial remedy available must be limited to post-administrative remedy judicial review." *Id.* at 1286 n. 29.

Cannon is of a different order. This is an individual claim that admission to respondent medical schools was denied because of the applicant's sex. A federal agency is available to consider such a claim and its processes have been invoked. A procedure for enforcement is provided. If there are intimations of broader issues in the claim, then, in the first instance at least, HEW ought to consider the implications as it is now apparently prepared to do. See HEW letter to Mr. Cannon, Cert. Pet. A. 35. HEW has been supplied with full medical school applicant data by both respondent Universities. HEW has "completed the on-site investigations" into Ms. Cannon's allegations. *Id.* If the agency is dragging its feet, then the alternate relief asked for in the complaint—a mandatory injunction against HEW—may be in order. But "from a policy viewpoint we see little to be gained by involving the judiciary in every individual act of discrimination based on sex." Court of Appeals, Cert. Pet. A. 16.

CONCLUSION.

For the foregoing reasons, we respectfully request that the petition for a writ of certiorari be denied.

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APPENDIX

TITLE IX, EDUCATION AMENDMENTS OF 1972

20 U. S. C.—

§ 1681. Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under

such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.